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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

DONALD R. CONANT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH COURT OF APPEALS DISTRICT OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In an unbroken line of cases spanning more than 70 years, this Court has held it is reversible error to refuse to instruct the jury that future earnings are subject to reduction to present day value in cases under the Federal Employers' Liability Act. *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485 (1916); *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409 (1985) (per curiam); *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988). In this case, the state trial court refused to instruct the jury on present value and, contrary to *Kelly*, *Dickerson* and *Monessen*, the appellate court held this error was harmless. The question presented by the appellate court's opinion, which also has created a conflict between the state courts in Texas and the federal district courts sitting in Texas, is as follows:

> Whether the state appellate courts may apply state law harmless error standards to circumvent this Court's holdings that, as a matter of federal law, the failure to submit a present value damage instruction in cases under the Federal Employers' Liability Act constitutes reversible error.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were petitioner Missouri Pacific Railroad Company and respondent Donald R. Conant. Petitioner is a wholly owned subsidiary of Pacific Rail System, Inc., which is itself a wholly owned subsidiary of Union Pacific Corporation, a publicly owned company.

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October Term, 1992

Missouri Pacific Railroad Company,

Petitioner,

vs.

Donald R. Conant,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The petitioner Missouri Pacific Railroad Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourth Court of Appeals District, San Antonio, Texas, entered on April 30, 1992.

OPINION BELOW

The opinion of the Texas Court of Appeals for the Fourth Court of Appeals District has not been reported. It is reprinted in Appendix A, p. A-1. No opinion was issued by the trial court. The trial court's judgment is reprinted in Appendix B, p. B-1. The Supreme Court of Texas denied petitioner's application for writ of error without opinion. Appendix C, p. C-1.

JURISDICTION

After timely appeal by petitioner, the judgment of the Fourth Court of Appeals affirming the trial court's judgment was entered on April 30, 1992. Petitioner's timely motion for rehearing was denied by the Fourth Court of Appeals on July 8, 1992. Appendix D, p. D-1. The Supreme Court of Texas denied petitioner's timely application for writ of error on November 11, 1992. Appendix C, p. C-1. The Supreme Court of Texas overruled petitioner's timely motion for rehearing on December 16, 1992. Appendix E, p. E-1. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1257(a) (Supp. 1992).

STATUTE INVOLVED

This action was brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (1986), which provides in pertinent part:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . .

45 U.S.C. § 51.

STATEMENT OF THE CASE

In 1989, respondent Donald R. Conant was employed by petitioner Missouri Pacific Railroad Company as an engineer. Conant had begun his employment as an engineer with Missouri Pacific in 1973. Late in 1983, he injured his left knee and was out of work for about 15 months. In 1985, he returned to work as an engineer, subject to certain medical restrictions, including not climbing vertical ladder engines. Because of his seniority, he

could decline any assignment that did not meet his medical restrictions. Approximately a year later, Conant moved into a management position, where he remained until 1988 when the department where he worked was abolished. He subsequently resumed work as an engineer with no changes to his seniority status.

In January 1989, Conant was climbing a vertical ladder into a train locomotive, when his left knee gave way. Conant fell to the ground and injured his back. Conant never returned to work as an engineer on the railroad.

In April 1990, Conant sued Missouri Pacific on the grounds that the injuries he sustained in the course of employment were caused by Missouri Pacific's negligence.

HOW THE FEDERAL QUESTION WAS PRESENTED

At the charge conference, Missouri Pacific requested that the trial court give the jury the following instruction on present value:

> In determining the amount to be awarded for future physical pain and mental anguish, if any, or future physical impairment, if any, or loss of earning capacity in the future, if any, you are instructed to award the present value of the loss. To determine present value, you are to find the amount of the loss and then discount that amount by deducting therefrom annually an amount equal to the highest rate of interest at which such sum could be safely and securely invested during the period of which you may allow such damages.

(Tr. 17; S.F. 1038).[1] The court originally denied the instruction because Missouri Pacific did not have on hand case law to refute Conant's argument that there were no cases anywhere requiring that future physical pain and mental anguish be discounted to

[1] The designation "Tr." (an abbreviation for "Transcript") signifies the pleadings and any other documents filed in the case; the designation "S.F." (an abbreviation for "Statement of Facts") signifies the trial testimony and any exhibits.

present value.[2] (S.F. 1038). In a later discussion, Conant persuaded the court that it did not need any instruction on present value because Conant's economics expert had already included present value in his calculations. (S.F. 1043-48). *See* Appendix A, pp. A-2-4. The court thereupon refused to include any instruction to discount future damages to present value. (Tr. 28). *See* Appendix A, pp. A-2-4.

On January 25, 1991, the jury returned a verdict in favor of Conant. The total amount awarded Conant was $844,103. Appendix F, pp. F-5-6. Of that amount, $255,000 constituted the award for lost future earnings.

The Fourth Court of Appeals ruled that the refusal of the trial court to submit the requested instruction on present value was erroneous, but held that the error was harmless under a Texas procedural rule, on the ground that Conant's expert witness had made allowance for present day value in his testimony and the amount awarded ($255,000) was less than the amount calculated by Conant's expert witness ($838,000). Appendix A, pp. A-2-4. Missouri Pacific raised the issue in its application for writ of error to the Supreme Court of Texas, which denied review without opinion. Appendix C, p. C-1.

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[2] The Fifth Circuit follows the majority view in federal courts of not discounting future pain and suffering, while the Second Circuit follows the minority view requiring future pain and suffering to be discounted. *See Texas & Pac. Ry. v. Buckles*, 232 F.2d 257, 264 (5th Cir.), *cert. denied*, 351 U.S. 984 (1956); *Oliveri v. Delta S.S. Lines, Inc.*, 849 F.2d 742, 750-51 (2d Cir. 1988).

REASONS FOR GRANTING THE PETITION

I.

The Texas appellate court's opinion circumvents this Court's holdings that a present value instruction must be submitted in all FELA actions, and the trial court's failure to do so constitutes reversible error.

This Court definitively resolved the issue of the proper measure of damages in an FELA action where the plaintiff seeks recovery of lost future wages in *Chesapeake & Ohio Ry. v. Kelly*, 241 U.S. 485 (1916). In *Kelly*, this Court reversed a state court judgment in favor of a plaintiff who had recovered as damages the gross amount of the earnings the employee would have earned to the end of his working life had he lived. This Court held that the fundamental underlying principle of the FELA was that damages should be compensatory only. Reasoning that it is "self-evident that a given sum of money in hand is worth more than the like sum of money payable in the future," this Court held that the jury must be instructed to reduce any award for lost future earnings to their present cash value. 241 U.S. at 489, 491.

In the ensuing decades, this Court has remained steadfast in this rule. In *St. Louis Southwestern Ry. v. Dickerson*, 470 U.S. 409 (1985) (per curiam), this Court summarily reversed a state court's refusal to instruct a jury in an FELA action that its award to the plaintiff must reflect the present value of any future losses the plaintiff should sustain. Endorsing *Kelly* "as a definitive statement of the law applicable to FELA cases," this Court found that the failure to give a present value instruction is reversible error. 470 U.S. at 412. In its most recent decision on the issue in an FELA action, *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988), this Court reaffirmed that the present value rule set forth in *Kelly* and *Dickerson* governs all FELA cases and again found that the state court's failure to instruct the jury on present value constituted reversible error. 486 U.S. at 341-42.

In this case, the Fourth Court of Appeals properly acknowledged that a jury instruction on present value is a substantive issue, governed by federal law. Appendix A, p. A-2 n. 1. The Fourth Court of Appeals also recognized that, under *Dickerson*, the trial court had committed error when it failed to instruct the jury on the present value of future damages. Appendix A, p. A-3. But the appellate court did not find the trial court's failure was reversible error, as required by *Kelly*, *Dickerson* and *Monessen*. Instead, the Fourth Court of Appeals applied Rule 81(b)(1) of the Texas Rules of Appellate Procedure, and found that the error was harmless. [1] As discussed below, however, both the legal and factual bases for the holding of the Fourth Court of Appeals are flawed under this Court's precedent.

For its legal basis, the Fourth Court of Appeals incorrectly relied upon its own holding in *Southern Pac. Transp. Co. v. Hernandez*, 804 S.W.2d 557 (Tex. App. — San Antonio, writ denied), *cert. denied*, 112 S. Ct. 406 (1991). In its opinion in *Hernandez*, the Fourth Court of Appeals had found it was erroneous for the trial court to fail to instruct on the non-taxability of the jury award, but then found the error harmless under Texas Rule of Appellate Procedure 81(b)(1). In reaching that decision, the court in *Hernandez* had relied upon *Flanigan v.*

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[1] Appendix A, pp. A-3-4. Texas Rule of Appellate Procedure 81(b)(1) provides:

> No judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case, or was such as probably prevented the appellant from making a proper presentation of the case to the appellate court; and if it appears to the court that the error affects a part only of the matter in controversy and that such part is clearly separable without unfairness to the parties, the judgment shall only be reversed and a new trial ordered as to that part affected by such error, provided that a separate trial on unliquidated damages alone shall not be ordered if liability issues are contested.

Burlington Northern Inc., 632 F.2d 880, 889 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981), which similarly held that the failure to instruct on non-taxability was not prejudicial. The Eighth Circuit in *Flanigan*, in turn, had relied on this Court's holding in *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490 (1980). In *Liepelt*, however, the question presented by this petition was not at issue. Instead, this Court, in *Liepelt*, in reviewing a wrongful death award under the FELA, addressed whether it was error for the trial judge to refuse to instruct the jury that the award of damages would not be subject to income taxation. 444 U.S. at 491.

In reviewing the damages award in *Liepelt*, this Court took explicit note of the disparity between the verdict ($775,000) and the pecuniary loss proven ($302,000), and observed that, because the award was substantially inflated, it was not "fanciful to suppose" that the jury believed that a large portion of the award would be subject to income taxes.[4] *Id.* This Court in *Liepelt* concluded that it "was error to refuse the instruction *in this case*." 444 U.S. at 498 (emphasis added). This Court did not find, as it had in *Monessen*, *Dickerson* and *Kelly*, that it would be prejudicial error in every FELA case to refuse to submit the requested instruction.[5] Instead, under the facts of *Liepelt*, this Court stated

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[4] This Court also found prejudicial error in not allowing the defendant railroad to prove through its economist the projected net earnings after taxes. 444 U.S. at 494. That issue is not present here.

[5] In *Flanigan*, there was not a substantial gap between the award and the pecuniary loss proven. 632 F.2d at 890. Other courts also have applied *Liepelt* depending upon the facts of the case at hand. *See, e.g., Vanskike v. ACF Indus., Inc.*, 665 F.2d 188, 206-07 (8th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982) (holding that because the disparity between the evidence and the award was not great, the refusal to give a non-taxability instruction would not require reversal, but, because the court was reversing and remanding the damages issue on another ground, it directed that the trial court, if requested, should give a non-taxability instruction on remand); *O'Byrne v. St. Louis Southwestern Ry.*, 632 F.2d 1285, 1287 (5th Cir. 1980), where the court found that the gap between the amount awarded and testimony adduced, although

that the use of the instruction would "eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages." *Id.* Thus, the application of a state harmless error rule as in *Hernandez*, or its federal counterpart,[6] as in *Flanigan*, with respect to a non-taxability instruction, is not inconsistent with this Court's precedent.

By contrast, this Court's precedent leaves no doubt that the failure to submit an instruction on present value is prejudicial error. Even the Eighth Circuit itself, which in *Flanigan* had found merely harmless error with respect to the non-taxability instruction, held that the failure to submit a present value instruction in an FELA case constituted prejudicial error, requiring reversal in *Beanland v. Chicago, Rock Island & Pac. R.R.*, 480 F.2d 109, 111, 114-15 (8th Cir. 1973) (citing *Kelly*). In fact, in *Dickerson*, this Court singled out the Eighth Circuit's holding in *Beanland* and endorsed its reliance "on *Kelly* as a definitive statement of the law applicable to FELA cases." 470 U.S. at 412. *Beanland*, then, and not *Flanigan*, provides the correct application of the standard of review to be used in this case.

The Eighth Circuit holding in *Beanland* is consistent not only with this Court's precedent but also with the rulings in the other circuits that have assiduously applied a reversible error standard where a present value instruction has not been given. For example, in *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 377 (5th Cir. 1989), a Jones Act case,[7] the Fifth Circuit held that it was "plain

not as substantial as the gap in *Liepelt*, required a finding that the failure to give a charge concerning non-taxability was reversible error.

[6] *See* 28 U.S.C. § 2111 (1982), which provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

[7] The Jones Act, 46 U.S.C. § 688 (1975), adopts the provisions of the FELA in connection with personal injury suits and has been held to have the same interpretation. *Kernan v. American Dredging Co.*, 355 U.S. 426, 431-32 (1958).

error" to fail to submit a present value instruction (even when not requested), requiring reversal. In *Blue v. Western Ry.*, 469 F.2d 487, 496 (5th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973), the court, in an FELA case, stated: "In [*Kelly*] the Supreme Court held that in actions brought under the FELA, it was mandatory that awards for loss of future earnings be reduced to present value through the use of an appropriate interest rate." The Second Circuit, in *Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij*, 443 F.2d 76, 77-78 (2d Cir. 1971), *cert. denied*, 411 U.S. 933 (1973), a longshoremen's case, remanded for a new trial on damages for failure to instruct the jury on present value, stating that the request for any award of future lost earnings to be discounted to present value was "in line with so many familiar and controlling decisions that extended citation would be superogatory."

The Third Circuit, in *Downie v. United States Lines Co.*, 359 F.2d 344, 345, 347-48 (3d Cir. 1966), *cert. denied*, 385 U.S. 897 (1966), an action under the Merchant Marine Act of 1920, 46 U.S.C. § 688 (1975), which incorporates provisions of the FELA, held that future damages must be reduced to present value, and remanded for a new trial on damages. The Fourth Circuit, in *Aldridge v. Baltimore & Ohio R.R.*, 866 F.2d 111 (4th Cir. 1989) (en banc), stated, "In our view, *Monessen* demonstrates that we erred in affirming the district court's judgment that Aldridge's damages need not have been adjusted to present value," and reversed and remanded for a new trial on damages. The Sixth Circuit, in *Rodgers v. Fisher Body Div.*, 739 F.2d 1102, 1106 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985), an employment discrimination case, cited *Kelly*, and stated that "[i]t is settled law in this Circuit that an award of future damages must be reduced to present value in order to take into account the earning power of the money." The Sixth Circuit held that it was "plain error" for the trial court not to instruct the jury on reducing future damages to present value, and reversed and remanded for a new

trial on damages. *Id.* at 1107.[8] Thus, while *Flanigan* may have been appropriate authority in *Hernandez*, it was not in this case, and the authority relied upon by the Fourth Court of Appeals for applying the harmless error standard is inapposite.

In applying the wrong legal standard, the Fourth Court of Appeals failed to recognize the distinction between this Court's holdings on the present value instruction that a court must give a jury on the one hand and the latitude accorded the jury in the actual calculation of present value on the other hand. For example, this Court, from time to time, has addressed various considerations that the trier of fact may take into account in calculating lost future benefits. In *Kelly*, this Court discussed the effect of interest earned by the plaintiff by investment, but did not lay down a precise formula as to how that effect must be ascertained. 241 U.S. at 489-91. In *Dickerson*, this Court discussed whether a jury must take into account inflation and other sources of wage increases as well as the rate of interest when calculating lost future benefits and concluded that the jury must indeed take into account those facts. 470 U.S. at 411-12. In *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 537-38 (1983), a case involving the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 904 (1986), this Court addressed various methods for determining the discount rate to be used in reducing lost future benefits to present value, but, citing *Kelly*, held that

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[8] Numerous state courts are in accord. *E.g., Failing v. Burlington N. R.R.*, 816 P.2d 974, 978 (Colo. App. 1991) (reversing for new trial on damages and holding that "[a]n award of damages for future monetary loss under the FELA *must* be adjusted to present value") (emphasis in original); *Eversole v. Consolidated Rail Corp.*, 551 N.E.2d 846, 852-53 (Ind. App. 1990) (FELA case in which the court held that the present value instruction is mandatory); *Anglim v. Missouri Pac. R.R.*, 832 S.W.2d 298, 308 (Mo.) (en banc), *cert. denied*, 113 S. Ct. 831 (1992) (holding that a present value instruction is mandatory in an FELA case if requested by any party); *Dunn v. Consolidated Rail Corp.*, 509 N.Y.S.2d 33, 34 (N.Y. App. Div. 1986) (FELA case holding that "[w]here a state court declines to give [a present value] instruction to guide the jury in its assessment of damages, the result is reversible error").

federal law did not compel the use of any single method of calculating the appropriate discount rate. In *Monessen*, this Court again refused to require any particular method for discounting future damages to present value, holding that "[t]his instruction improperly took from the jury the essentially factual question of the appropriate rate at which to discount [the plaintiff's] FELA award to present value. . . ." 486 U.S. at 342. In *Liepelt*, as discussed above, this Court addressed whether the jury should take into account the non-taxability of a future benefits award to the decedent plaintiff and concluded that it should, *in that case*, stating:

> [t]o put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable.

444 U.S. at 498 (quoting *Burlington Northern, Inc. v. Boxberger*, 529 F.2d 284, 297 (9th Cir. 1975)). In none of those opinions, however, has this Court altered its firm position that it is reversible error not to instruct the jury on the present value of lost future benefits. This Court explained the distinction between the mandatory nature of a present value instruction and the discretion accorded to the trier of fact when calculating present value in this manner:

> Although our decision in [*Pfeifer*] makes clear that no single method for determining present value is mandated by federal law and that the method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest, it is equally clear that an utter failure to instruct the jury that present value is the proper measure of a damages award is error.

Dickerson, 470 U.S. at 412.

It is well settled that " 'the proper measure of damages [under the FELA] is inseparably connected with the right of action,' and

therefore is an issue of substance that 'must be settled according to general principles of law as administered in the Federal courts.' " *Monessen*, 486 U.S. at 335 (quoting *Kelly*, 241 U.S. at 491; citing *Dickerson*, 470 U.S. at 411, and *Liepelt*, 444 U.S. at 493). By applying a "reversible error" standard of review, this Court effectively has found that present value jury instructions always affect "substantial rights of parties," as set forth in 28 U.S.C. § 2111. The conflicting conclusion by the Fourth Court of Appeals that the error of the trial court was harmless cannot stand, because the "utter failure" to instruct the jury on present value is "at odds with federal law," and constitutes reversible error. *Dickerson*, 470 U.S. at 412.

For its factual basis, the Fourth Court of Appeals incorrectly concluded that the trial court's refusal to submit a present value instruction was "harmless error." That erroneous conclusion reinforces the critical importance of a mandatory reversible error standard in FELA actions. The Fourth Court of Appeals cited testimony from Conant's expert witness in which he testified that he had made allowance for present day value in calculating Conant's lost future earnings and a statement made by counsel for Missouri Pacific when cross-examining the expert witness. Appendix A, p. A-4. But a jury takes its law from the court and *not* from counsel or witnesses. *See Armstrong Tire & Rubber Co. v. Shearer*, 290 S.W.2d 294, 296 (Tex. Civ. App. — San Antonio 1956, writ ref'd n.r.e.) (affirming trial court's exclusion of lawyer's testimony concerning his knowledge of the law); 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2556 (1971) ("It is the inescapable duty of the trial judge to instruct the jurors, fully and correctly, on the applicable law of the case, and to guide, direct, and assist them toward an intelligent understanding of the legal and factual issues involved in their search for truth").

This case vividly illustrates why testimony or counsel's statements cannot alone suffice as proper guidance for the jury.

Without the threshold instruction from the trial court that any award of future damages *must* be based solely upon present value, the Fourth Court of Appeals could not have ascertained whether the jury in fact did reduce the lost future earnings award in this case to present value. Because the trial court utterly failed to instruct the jury on present value, the legal presumption that the jurors followed the jury instructions is not available. *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) ("The theory under which jury instructions are given by trial courts and reviewed on appeal is that juries act in accordance with the instructions given them, . . . and that they do not consider and base their decisions on legal questions to which they are not charged"); *Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 167 (Tex. 1982). The fact that the outcome of the jury's deliberation was lower than the expert's figure cannot render the error harmless, because it is impossible to demonstrate that the jury reached its figures by discounting for present value inasmuch as the jury did not award the exact discounted figure computed by the expert or anywhere near that figure. If anything, the substantial disparity between the award ($255,000) and the expert's figure in this case ($838,000) leads to the conclusion that the jury was impermissibly set loose without the guidance from the trial court that this Court has mandated must always be given.

This Court has stated explicitly that the "cost of human injury, an inescapable expense of railroading, must be borne by someone, and the FELA seeks to adjust that expense equitably between the worker and the carrier." *Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 329 (1958). As part of that adjustment, this Court has insisted that the plaintiff is entitled to recover fair and reasonable compensation for his actual losses, but no more, and the defendant is not required to compensate the plaintiff for speculative damages. To accomplish that objective, this Court has mandated that state procedural rules not impinge upon the allocation of duties between judge and jury. *See Dice v. Akron, Canton & Youngstown R.R.*, 324 U.S. 359, 361 (1952) (allocations of

functions between court and jury may not be determined on the basis of state law because this might defeat federal rights). A jury is capable of reducing gross loss to present value intelligently, once it has been instructed by the court to perform that function. *Cassino v. Reichhold Chems.*, 817 F.2d 1338, 1347-48 (9th Cir. 1987), *cert. denied*, 484 U.S. 1047 (1988); *Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665, 669 (5th Cir. 1974) (en banc) (citations omitted). In this case, the trial court abdicated that function to the jury without any guidance or direction, thereby depriving Missouri Pacific of its federal right to protection against being held liable for damages based upon mere conjecture and guess. The speculations by the Fourth Court of Appeals about the jury's collective mental process do not salvage the reversible error that was committed by the trial court in this case. This Court should grant this petition for writ of certiorari to correct the reversible error committed by the Fourth Court of Appeals.

II.

The Texas appellate court's decision has created a conflict in FELA actions between Texas courts and federal district courts sitting in Texas.

A fundamental purpose of the FELA is to assure nationwide uniformity in interstate carriers' financial responsibilities for injuries to their employees: "This Court has long recognized that the FELA 'has a uniform operation, and neither is nor can be deflected therefrom by local statutes.'" *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 433 (1965) (quoting *Panama R.R. v. Johnson*, 264 U.S. 375, 392 (1924)). To secure that uniformity, state courts "are required to apply federal substantive law in adjudicating FELA claims." *Monessen*, 486 U.S. at 335 (citing *Dickerson*, 470 U.S. at 411, and *Chesapeake & Ohio R.R. v. Kuhn*, 284 U.S. 44, 46-47 (1931)).

The trial court's refusal to instruct the jury to reduce the future damage award to present value deprived Missouri Pacific of its federal right to have the jury correctly instructed on the essential fact question of present value. This Court has, from the outset in FELA actions, rejected the traditional substance-procedure dichotomy developed in conflict of law cases.[9] *See Atlantic Coast Line R.R. v. Burnette*, 239 U.S. 199, 201 (1915) ("In dealing with enactments of a paramount authority, such as Congress is, within its sphere, over the states, we are not to be curious in nomenclature if Congress has made its will plain, nor to allow substantive rights to be impaired under the name of procedure"). Thus, a state rule that might be viewed as procedural, or whose principal purpose is procedural, may not be followed in FELA state court actions where these rules would substantively interfere with, lessen or destroy federal rights. *See, e.g.*, Note, *State Enforcement of Federally Created Rights*, 73 Harv. L. Rev. 1551, 1560-61 (1960).

In implementing this mandate, this Court has repeatedly rejected attempts by state courts to apply state law standards that conflict with federal standards regarding jury instructions. In *Dickerson*, this Court struck down a Missouri Court of Appeals' affirmance of a trial court's refusal to submit a present value instruction as "inappropriate" under Missouri law because the Missouri approved instructions did not call for such an instruction in FELA cases. This Court plainly stated that whether a present value instruction "should have been given is a federal question." 470 U.S. at 411. Similarly, in *Monessen*, this Court reversed a Pennsylvania Supreme Court ruling affirming the trial court's judgment based upon submission of a "zero discount rate" present value instruction, and rejected the holding that Penn-

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[9] *See* Alfred Hill, *Substance and Procedure in State FELA Actions — The Converse of the Erie Problem?* 17 Ohio State L.J. 384, 386 (1956).

sylvania's "total offset" rules controlled the form of jury instructions to be submitted in an FELA case. 486 U.S. at 340.

Any deviation from the federal present value instruction rule would mean that the outcome in an FELA case would depend on whether the suit is brought in a particular state court or in a state or federal court. Federal district courts sitting in Texas must follow Fifth Circuit precedent holding that a present value instruction is mandatory and the failure to submit the instruction is reversible error. *Colburn v. Bunge Towing, Inc.*, 883 F.2d at 377; *Blue v. Western Ry.*, 469 F.2d at 496. The Fourth Court of Appeals' decision therefore has created a conflict between Texas courts and federal district courts sitting in Texas in FELA actions. Such a conflict contravenes the policy set forth in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *See Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204 (1956) ("The nub of the policy that underlies *Erie R.R. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result").

The conflict created by the Fourth Court of Appeals' decision not only undermines the statutory goal of fairness and uniformity, it also increases the potential for unhealthy forum shopping. This problem is particularly serious because FELA plaintiffs have the option of bringing their claims against defendant railroads in state courts, 45 U.S.C. § 56 (1986),[10] and the statute offers defendant railroads no opportunity to remove those claims to federal court.

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[10] 45 U.S.C. § 56 provides in pertinent part:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

28 U.S.C. § 1445(a) (Supp. 1992).[11] Conflicts with respect to federal law are never desirable. Given the specific purpose of the FELA to promote uniformity and the unique jurisdictional provisions of the statute, resolution of the conflict created by the Fourth Court of Appeals' decision is particularly important. The Supreme Court of Texas has indicated, by denying Missouri Pacific's request for review of the Fourth Court of Appeals' judgment, that it will not resolve the conflict. This Court should use the grant of a writ of certiorari to resolve the conflict created by the Fourth Court of Appeals' decision.

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[11] 28 U.S.C. § 1445(a) provides:

> A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States.

CONCLUSION

The Fourth Court of Appeals has denied Missouri Pacific its federal right to have a present value instruction submitted to the jury, contrary to *Kelly, Dickerson and Monessen*. Texas state courts and federal courts sitting in Texas are in conflict and the grant of the writ of certiorari is the appropriate method to restore uniformity in FELA actions in Texas. Therefore, Missouri Pacific prays this Court to issue its writ of certiorari and to order a retrial, with Missouri Pacific having the right to submit a present value instruction to the jury.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT OF TEXAS
SAN ANTONIO

OPINION

Appeal No. 04-91-00254-CV

MISSOURI PACIFIC RAILROAD COMPANY D/B/A
UNION PACIFIC RAILROAD COMPANY,

Appellant

V.

DONALD R. CONANT,

Appellee

**APPEAL FROM THE 150TH DISTRICT COURT OF
BEXAR COUNTY
TRIAL COURT NO. 90-CI-05266
HONORABLE CARLETON B. SPEARS,
JUDGE PRESIDING**

Opinion by: Fred Biery, Justice

Sitting: David Peeples, Justice
Fred Biery, Justice
Ron Carr, Justice

Delivered and filed: April 30, 1992

AFFIRMED.

This appeal follows an adverse jury verdict in a suit brought pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60 (1986). Appellee, Donald R. Conant (Conant), filed suit against Missouri Pacific Railroad Company (Missouri Pacific), alleging that, while employed by Missouri Pacific, he sustained injuries and incurred damages caused by Missouri Pacific's negligence. Based on the jury verdict, the court entered a judgment in favor of Conant in the amount of $844,103.00 plus post-judgment interest and costs of court. We affirm.

In its first point of error, Missouri Pacific argues that the trial court's refusal to instruct the jury to discount to present value damages for future pain and suffering was reversible error. To support this proposition, appellant cites *St. Louis S.W. Ry. v. Dickerson*, 470 U.S. 409 (1985). In *Dickerson*, a railroad policeman brought an FELA action in a Missouri state court against his employer for injuries sustained in a fall from a railroad car. *Id.* at 410. The trial judge refused to submit a requested instruction regarding the present-value of future damages because the instruction was not provided for in the Missouri Approved Instructions promulgated by the state for use in FELA cases.[1] The Supreme Court found that such an instruction was required to insure that the jury award to the plaintiff reflected the present value of any future losses the plaintiff should sustain. *Id.* at 412. In reversing the case, the Court stated:

> . . . [while] no single method for determining present value is mandated by federal law . . . that method of calculating present value should take into account inflation and other sources of wage increases as well as the rate of interest, . . . an utter failure to instruct the jury that present value is the proper measure of a damage award is error.

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[1] FELA cases adjudicated in state court are governed by state law for procedural issues, but federal law for substantive issues. *Dickerson*, 470 U.S. at 411; *Dutton v. Southern Pac. Transp.*, 576 S.W.2d 782, 783-84 (Tex. 1978). A jury instruction on present value is a substantive issue and is, therefore, governed by federal law. *Dickerson*, 470 U.S. at 411.

Id. Following *Dickerson*, we hold it was erroneous for the trial court to fail to instruct the jury on the present value of future damages.

Appellant relies on *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372 (5th Cir. 1989), to argue that the failure of the trial court to include a present value instruction requires an automatic finding of reversible error. In *Colburn*, the fifth circuit found even when a defendant does not object to the failure of the trial court to include a present value instruction for the award of future damages, the failure to give such an instruction is reversible error. *Id.* at 377. We do not find *Colburn* persuasive under the facts of this case. Rather, a recent opinion issued by this Court is compelling. In *Southern Pac. Transp. Co. v. Hernandez*, 804 S.W.2d 557, 561 (Tex. App. — San Antonio, writ denied), *cert. denied*, 112 S.Ct. 406 (1991), the appellant railroad argued that the court's refusal to include a jury instruction on the non-taxability of a FELA award amounted to reversible error. The leading case regarding the issue was a United States Supreme Court decision holding that it was erroneous for the trial judge to fail to instruct on the non-taxability of the award. The railroad relied upon fifth circuit cases to support its argument that such error constituted reversible error. In rejecting the argument, this court cited Rule 81(b)(1) of the Texas Rules of Appellate Procedure which states:

> [n]o judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that the error complained of amounted to such a denial of the rights of appellant as was reasonably calculated to cause and probably did cause rendition of an improper judgment in the case . . .

We found, in *Hernandez*, the trial court's failure to include appellant's requested instruction on the non-taxability of the plaintiff's award did not cause the rendition of an improper verdict. *Id.* Everitt Dillman, Ph.D., plaintiff's expert witness,

testified he had deducted income taxes when calculating Hernandez' past and future wage losses. *Id.* at 562. The jury was, therefore, aware that income taxes had been deducted and the verdict indicated the jury did not improperly inflate the recovery because it was less than the highest values given by Dr. Dillman, and only slightly higher than the smallest value. *Id.*

In this case, Dr. Dillman also testified on behalf of the Plaintiff, Conant. In explaining his computations he stated:

> The fourth thing that I have to do is that I have to also allow for the fact that we are talking about monies that won't be received in the second year and the third year all the way up to the twenty-third year . . . . But I have to represent that flow of twenty-three years as one hunk of money . . . . We call it *present day value*. (emphasis added).

That he made the allowance for present day value is again brought out in appellant counsel's cross examination:

> Q. [by Missouri Pacific attorney]: . . . we have to discount to present value when we are talking about future earnings?
>
> A. [by Dr. Dillman]: I already have.

Dr. Dillman placed a minimum discounted present value of $838,000 on Conant's future lost wages. The jury assessed the future lost earnings at $255,000; an amount considerably less than the discount amount calculated by Dr. Dillman. The trial court's failure to include Missouri Pacific's requested present value instruction did not cause the rendition of an improper verdict. As in *Hernandez*, the jury was aware future earnings had been discounted to present value and the verdict indicated the jury did not inflate recovery because the award for future lost earnings was less than the discounted amount calculated by Dr. Dillman. Point of error number one is overruled.

In points of error two and three, Missouri Pacific contends the trial court committed reversible error in denying Missouri Pa-

cific's motion to amend its pleadings at trial to assert the contributory negligence of the Plaintiff, Conant. The decision to grant or deny a trial amendment is within the discretion of the trial court and an order denying a trial amendment cannot be set aside absent a clear showing that the court abused its discretion. TEX. R. CIV. P. 63; *Hardin v. Hardin*, 597 S.W.2d 347, 349 (Tex. 1980); *Wright v. Wright*, 710 S.W.2d 162, 167 (Tex. App. — San Antonio 1986, writ ref'd); *see also Reyna v. Reyna*, 738 S.W.2d 772, 774-75 (Tex. App. — Austin 1987, no writ) (discussing abuse of discretion generally).

Missouri Pacific argues the court abused its discretion by violating the legal principle that trial amendments must be granted if the opposing party does not show surprise. *Smith v. Smith*, 720 S.W.2d 586, 604 (Tex. App. — Houston [1st Dist.] 1986, no writ); *Rocha v. Ahmad*, 676 S.W.2d 149, 154 (Tex. App. — San Antonio 1984, writ dism'd). It contends the amendment should have been allowed because the assertion of contributory negligence of Conant was contained in appellant's pleadings prior to trial and, therefore, Conant was not surprised by the proposed amendment. The record reflects, however, that Missouri Pacific had pled contributory negligence, but subsequently reversed its position by telefax. In response to an inquiry from Conant's counsel, Missouri Pacific's attorney sent the following message:

> I intend to omit comparative responsibility for injuries from my pleadings. /s/W

It was not until the third day of trial that appellant attempted to revive its original position and assert contributory negligence.

An allegation of contributory negligence made for the first time during trial changes the theory on which the case is tried. *Missouri-Kan.-Tex. R.R. v. Alvarez*, 703 S.W.2d 367, 370 (Tex. App. — Austin 1986, writ ref'd n.r.e.). Once an amendment introducing a new substantive matter has been refused by

the trial court, the burden of showing an abuse of discretion is upon the complaining party. *Hardin*, 597 S.W.2d at 349. To meet this burden, appellant states that (1) Conant was not, or should not have been, surprised by the amendment because Missouri Pacific had pled contributory negligence before it stipulated in writing no such theory would be pursued and (2) Conant's counsel violated Missouri Pacific's stipulation by bringing in testimony which "opened the door" to this issue. Missouri Pacific cites no authority for its argument, and we find neither argument persuasive. The trial judge did not commit error in denying an amendment which violated appellant's pretrial stipulation and changed the factual basis and legal theory upon which the case was proceeding. Points of error numbers two and three are overruled.

In points of error four, five and six, Missouri Pacific argues that evidence of the risk of paralysis, whether from future surgery or subsequent trauma, and Conant's fear of paralysis, should not have been admitted into evidence because the proper predicate or foundation was not laid. According to the Railroad, such evidence caused the amount awarded to Conant for future pain and suffering to be "excessive and likely the result of bias and prejudice." Although these points of error are couched in terms of improper predicate, Missouri Pacific fails to state what it asserts as the proper predicate. In fact, there was no error in admitting the evidence. The real substance of Missouri Pacific's argument is that the evidence does not support the jury's findings of $400,000.00 for mental anguish. Conant has responded to the substance of this argument.

Testimony concerning the "risk of paralysis" was from the video deposition of Dr. Richard P. Wilson. Dr. Wilson testified that Conant has bulging thoracic discs which continue to degenerate and cause pain. He also testified that surgery for thoracic discs is very dangerous, with the risk of paralysis being between thirty-five and forty-five percent, and that he did not recommend the

operation for Conant. Additionally, he stated that Conant risked paralysis if he continued to continue to work for the railroad and suffered a jolting injury such as a train derailment or hard uncoupling.

In order for a plaintiff to recover for future pain and suffering for bodily injuries he must show by expert medical testimony that there is a reasonable probability that such damages will occur in the future.[2] *Fisher v. Coastal Transport Co.*, 230 S.W.2d 522, 525 (Tex. 1950); *see also Lenger v. Physician's Gen. Hosp.*, 455 S.W.2d 703, 706 (Tex. 1970); *Powell v. Underbrink*, 499 S.W.2d 206, 211 (Tex. Civ. App. — San Antonio 1973, no writ). Expert testimony must be confined to injuries which are reasonably probable, and the verdict must be based upon evidence that shows the injury will produce a given effect. *Galveston H. & S.A. Ry. v. Powers*, 101 Tex. 161, 164, 105 S.W. 491, 493 (1907); *see also Insurance Co. of N. Am. v. Myers*, 44 S.W.2d 710, 713 (Tex. 1966). Missouri Pacific contends the evidence does not support the jury's award for mental anguish because Conant did not show by "reasonable probability" that he would require and undergo surgery and that he would continue to work for the railroad. This argument is without merit, however, because Conant sought damages arising out of the injury which caused the bulging discs, not arising out of the surgery to correct the problem or a future railroad accident. Thus, under *Fisher* and *Powers*, Conant was required to show by expert testimony that there is a reasonable probability that the bulging disc injury will cause pain and suffering in the future. Dr. Wilson's testimony evidences such a

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[2] Missouri Pacific cites several cases standing for the proposition that the recovery of future medical expenses must be based upon reasonable medical probability that the expenses are necessary. Conant, however did not seek or obtain any recovery for future medical expenses based on the risk of future paralysis. The only recovery of future medical expenses was the sum of $40,000.00. This amount was based upon Dr. Wilson's testimony that Conant would incur approximately $1,000.00 per year of medical expenses for the remainder of his life without the surgery.

result: Conant could undergo surgical repair of the bulging discs, but risk a thirty-five to forty-five percent chance of paralysis, or continue to live in pain. He could also become paralyzed as a result of a jolting injury. This injury could conceivably occur in a non-railroad related accident. Missouri Pacific did not contradict Dr. Wilson's testimony or object to his diagnosis. We find Conant has established a reasonable medical probability that the injury would cause pain, and perhaps paralysis if surgery was chosen or a jolting accident occurred. We hold there was sufficient evidence of an increased risk of paralysis and that this is a proper factor for the jury to consider when awarding future pain and suffering damages, regardless of whether he has the surgery.

Testimony concerning Conant's "fear of paralysis" was given by Conant himself. When asked about his medical condition, Conant testified:

> A. My understanding was that if I had an action that caused too much pressure on my back that the disc could rupture and could cause paralysis.
>
> Q. Has this created any worry or fear or anything on your part?
>
> A. Yes, sir. I constantly keep eyes in the back of my head open for anything that could come up, somebody hit me in the back mistakenly or especially when I am driving a vehicle, I keep a real close eye on who is following me and the distance that they are behind me, try to avoid any type of rear end collision.

Missouri Pacific contends the trial court allowed this testimony in misplaced reliance upon *Dartez v. Fibreboard Corp.*, 765 F.2d 456 (5th Cir. 1985) and *Hagerty v. L & L Marine Servs., Inc.*, 788 F.2d 315 (5th Cir. 1986). In *Dartez*, the plaintiff brought suit for damages arising out of his exposure to asbestos. 765 F.2d at 460. The court ruled the evidence did not establish a reasonable medical probability the plaintiff would develop cancer because of exposure to asbestos. The fifth circuit panel determined, however,

that Texas courts would permit the introduction of the plaintiff's fear of contracting cancer as a basis for recovery of mental anguish damages, even though it was not medically probable he would get the disease. *Id.* at 467. Similarly, in *Hagerty*, the Court allowed the plaintiff to recover damages for mental distress arising from fear of developing cancer where the fear was "reasonable and causally related to the defendant's negligence." 788 F.2d at 318.

According to Missouri Pacific, ". . . the cancerphobia cases are distinguishable because a latent disease is already present, but for Conant to become paralyzed another remote event would have to intervene." To support this proposition, Missouri Pacific relies upon *Gaston v. Flowers Transp.*, 866 F.2d 816, 819 (5th Cir. 1989), where the court refused to permit the plaintiff to recover for mental anguish caused by seeing his brother crushed to death and *Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 591-92 (5th Cir. 1986), where the court excluded evidence of the plaintiff's fear of cancer. In both cases, the plaintiffs failed to prove, or offer to prove, that there was a medical probability they would contract damages in the future; Gaston failed to show there was a reasonable probability his brother would be crushed to death as a result of his present existing injury and Adams failed to show, or offer to show, there was a medical probability he could contract cancer from asbestos exposure. In this case, Conant has proven there was a reasonable medical probability he would become paralyzed if he chose to undergo corrective surgery. Dr. Wilson testified that Conant might become paralyzed if he were involved in another railroad accident. Based upon this, and his belief that any type of jolting accident would cause paralysis, Conant testified that he feared paralysis might result from the injury which caused the thoracic discs to bulge. We find Conant has proven by reasonable medical probability his fear of paralysis. Point of error number five is overruled.

In point of error number six, Missouri Pacific contends the trial court erred in refusing to grant its motion for new trial. According to appellant, the jury's $400,000.00 award for pain and suffering was "excessive and likely was the result of bias and prejudice of the jury caused by the erroneous admission of evidence of risks of paralysis and refusal to instruct the jury to reduce the award to present value." As previously discussed in point of error number three, it was not reversible error for the trial judge to refuse to instruct the jury to reduce the award to present value. Additionally, in overruling points of error numbers four and five, we have held that the jury was entitled to consider testimony regarding paralysis. The burden is now upon Missouri Pacific to prove the trial judge abused his discretion in refusing to grant a new trial on the ground of excessiveness of the verdict. *Nairn v. National R.R. Passenger Corp.*, 837 F.2d 565, 566 (2nd Cir. 1988). In Texas, a jury award will be set aside or reduced on the grounds of passion, prejudice or bias only if it is so excessive as to shock the conscience of the court. *Detar Hosp., Inc. v. Estrada*, 694 S.W.2d 359, 364 (Tex. App. — Corpus Christi 1985, no writ); *Green v. Rudsenske*, 320 S.W.2d 228, 235 (Tex. Civ. App. — San Antonio 1959, no writ). In making that determination, the court must review only that evidence which is favorable to the award and it must not be disturbed if there is evidence to sustain it. *V. Mueller & Co. v. Corley*, 570 S.W.2d 140, 146 (Tex. Civ. App. — Houston [1st Dist.] 1978, writ ref'd n.r.e.). A verdict based largely on pain and suffering is an area in which the jury's findings must be given special weight. *Id.; Monsanto Co. v. Milam*, 480 S.W.2d 259, 268 (Tex. Civ. App. — Houston [14th Dist.] 1972, writ granted), *aff'd*, 494 S.W.2d 534 (Tex. 1973). Since there are no objective guidelines or mathematical formulae for the assessment of mental anguish damages, the jury must make a reasonable estimate of a fair compensation. *Port Terminal R.R. Ass'n v. Macaluso*, 450 S.W.2d 873, 877 (Tex. Civ. App. — Houston [1st Dist.] 1970, no writ); *Green v. Meadows*, 527 S.W.2d 496, 499 (Tex. Civ. App. — Houston [1st Dist.] 1975, writ ref'd n.r.e.).

The jury awarded Conant $400,000.00 for future pain and suffering. The record reflects the jurors heard uncontradicted testimony by Dr. Wilson that surgery for Conant was risky and not recommended and that paralysis may result from a railroad accident. Conant testified of his fears about future paralysis and that he believes he would become paralyzed as a result of a non-railroad accident involving a jolt. They also heard that Conant would require medical treatment in the future and that, although the pain has lessened somewhat, it is a constant presence for him. He is restricted in his ability to work. Prior to his injury, he was earning over $72,000 in salary and fringe benefits as an employee of Missouri Pacific. As a consequence of the accident, Conant was unable to work for several months. Since his career with the railroad was at an end, Conant sought alternate employment. Untrained for anything other than railroad work, he took up a route delivering newspapers. He later returned to the job he held as a high school student — delivering pizza for minimum wage plus tips. He currently earns about one-fifth of what he earned while working for the appellant and has filed personal bankruptcy. Conant also testified that he is considerably impaired in his ability to function as a husband and father. He can no longer pick up his children and play with them and becomes short and irritable with his family. He cannot sleep; the only relief from pain available for him is to sleep on the floor. There is evidence in the record that Conant is generally a person seriously changed from the way he was prior to the occurrence.

Missouri Pacific cites *Nairn v. National R.R. Passenger Corp.*, 837 F.2d at 567, where the court found the $400,000 award for pain and suffering excessive. In that case, however, as Missouri Pacific points out, the plaintiff had no prognosis of further difficulty unless he suffered further trauma to his back. *Id.* Missouri Pacific also cites *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87, 93 (5th Cir. 1984), where the court found an award of $485,000.00 excessive for pain in a back injury case requiring two operations and *Westbrook v. General Tire & Rubber Co.*,

754 F.2d 1233, 1237 (5th Cir. 1985), overturning a jury award of $925,000.00 for knee and back injuries which were vulnerable to more serious problems. It appears from the record the testimony supports a more serious prognosis for Conant. The jury considered direct, consistent and uncontradicted testimony regarding Conant's prognosis and his fear of paralysis. We cannot conclude the award of $400,000 is so great as to shock the conscience. *See Davlin, Inc. v. Juarez,* 766 S.W.2d 347, 352 (Tex. App. — El Paso 1989, writ denied) (award of approximately $240,000 for past and future pain and suffering for herniated and bulging discs upheld); *Cantu v. Del Carmen Pena,* 650 S.W.2d 906, 910-11 (Tex. App. — San Antonio 1983, writ ref'd n.r.e.) ($500,000 award for neck and back pain not excessive). Point of error number six is overruled.

In point of error number seven, Missouri Pacific argues the trial court erred in denying the following instruction:

> You are not permitted to award the plaintiff speculative damages by which term is meant compensation for future detriment which, although possible, is remote, conjectural or speculative. You can only award for future detriment if a preponderance of the evidence shows such a degree of probability of that detriment occurring of amounts to a reasonable certainty that it will result from the original injury in question.

Missouri Pacific contends this instruction was necessary to "ameliorate the effect of the speculative evidence of future paralysis by instructing the jury not to consider such evidence in determining its verdict." Missouri Pacific did not object to the paralysis testimony of either Dr. Wilson or Conant as being speculative. No objection was made to Dr. Wilson's qualifications as an expert and no evidence was offered to contradict any of the statements which Missouri Pacific now contends are "speculative."

The trial court has considerable discretion in deciding what definitions and instructions are necessary in submitting issues to

the jury. TEX. R. CIV. P. 277, *Green Tree Acceptance, Inc. v. Combs*, 745 S.W.2d 87, 89 (Tex. App. — San Antonio 1988, writ denied). Proper instructions are those which aid the jury in answering the questions and which find support in the evidence and the inferences to be drawn from the evidence. *Steinberger v. Archer County*, 621 S.W.2d 838, 841 (Tex. App. — Fort Worth 1981, no writ). On appeal, the burden is upon the complaining party to show the trial court's failure to give a requested instruction "resulted in such a denial of his rights as was reasonably calculated to cause and probably did cause the rendition of an improper verdict." *City of San Antonio v. Dunn*, 796 S.W.2d 258, 263 (Tex. App. — San Antonio 1990, writ denied). Missouri Pacific failed to make such a showing.

While an instruction requiring proof of future pain and suffering "with reasonable certainty" is permissible under *Rouse v. Chicago, Rock Island & Pac. R.R.*, 474 F.2d 1180, 1184 (8th Cir. 1973), such an instruction would have been redundant in this case. The court instructed the jury to find the loss of earnings, amount of pain and suffering and medical care which "in reasonable probability," Donald Conant will suffer/require in the future. In light of the trial court's repeated use of this term in each of the issues pertaining to future damages, the proposed instruction admonishing the jury not to speculate and to award damages only amounting to a "reasonable certainty" was unnecessary. Once the controlling issues have been submitted, the trial court commits no error by refusing to submit other issues and various shades of the same issue. TEX. R. CIV. P. 277; *Sinko v. City of San Antonio*, 702 S.W.2d 201, 208 (Tex. App. — San Antonio 1985, writ ref'd n.r.e.). We find the issues and instructions fairly submitted the disputed facts for the jury's determination. *Baker Marine Corp. v. Moseley*, 645 S.W.2d 486, 488-89 (Tex. App. — Corpus Christi 1982, writ ref'd n.r.e.).

Additionally, as discussed in points of error numbers four and five, Conant proved, by a reasonable degree of medical

probability, that he would suffer a risk and fear of future paralysis resulting from the two bulging thoracic discs which are the subject of this litigation. Since evidence of future paralysis was properly admitted and relied upon by the jury, Missouri Pacific was not entitled to an instruction telling the jury such evidence was speculative. Point of error number seven is overruled.

In points of error numbers eight and nine, Missouri Pacific contends the trial court committed reversible error when it admitted evidence of an advance paid to Conant. Specifically, it objects to the admission into evidence of a standard railroad form document entitled "Advance Payment Receipt" which evidences Conant's obligation to repay to Missouri Pacific the sum of $51,500.00. Missouri Pacific objected to this admission, arguing it was evidence of settlement negotiations and/or an offer to pay medical expenses and was therefore not admissible under Rules 408 and 409 of the Texas Rules of Evidence. The document states in part:

> I, Donald R. Conant, having sustained personal injury while employed by Missouri Pacific Railroad Company at Taylor, Texas on January 26, 1989, and having a claim for compensation and damages as a result of said injury, hereby acknowledge receipt from Missouri Pacific Railroad Company, the sum of $4,400, as an advance payment to be applied in reduction of any amount I may receive as a result of said injury, making a total advanced to me to date of $51,500.00. Said payment is not to be considered an admission of liability for said injury, or of any other matter.[3]

Evidence of offers to settle or compromise a disputed claim are not admissible as a general rule under Rule 408 of the Rules of Evidence. This information should be excluded because it may be taken by the jury to be an admission of liability. *City of Houston v. Sam P. Wallace & Co.*, 585 S.W.2d 669, 673 (Tex. 1979).

---

[3] On Missouri Pacific's objection to the document's admissibility, the trial judge detected [*i.e.*, deleted] the words "from any settlement or judgment" from the text of the Receipt.

Rule 409 of the Texas Rules of Evidence provides that evidence of offering or promising to pay medical or similar expenses occasioned by an injury is not admissible to prove liability. Missouri Pacific contends, that, while the advance is not a settlement agreement, it might be construed as such, and was, therefore, not admissible. Additionally, according to appellant, the advance is akin to the payment of medical expenses and was admitted in violation of Rule 409.

It is within the discretion of the trial court to determine from the surrounding facts and circumstances whether a particular statement is offered as a compromise. The trial judge's discretion in this regard will not be overturned if the decision is supported by sufficient evidence. *In the interest of J T H,* 630 S.W.2d 473, 476 (Tex. App. — San Antonio 1982, no writ); *Allen v. Avery*, 537 S.W.2d 789, 791 (Tex. Civ. App. — Texarkana 1976, no writ). An offer of compromise can be defined as "an agreement in which a party concedes some right to which he believes he is entitled in order to bring about a mutual settlement." *Mercedes-Benz of N. Am., Inc. v. Dickenson,* 720 S.W.2d 844, 857 (Tex. App. — Fort Worth 1986, no writ); *Duval County Ranch Co. v. Alamo Lumber Co.*, 663 S.W.2d 627, 634 (Tex. App. — Amarillo 1983, writ ref'd n.r.e.).

Here, the document contains no mention of the word "settlement" or of any proposed compromise on the part of Missouri Pacific. It does not contain an express admission of liability or suggest that a settlement proposal was made; it states that the payment is not an admission of liability. Similarly, nothing in the document establishes that medical expenses were furnished or paid. Since the document does not expressly create an offer of compromise or settlement, it must be determined whether the evidence infers such an offer.

As a general rule, Texas courts will not imply an offer of compromise or settlement in the absence of express language creating such an agreement. *Beutel v. Paul*, 741 S.W.2d 510, 513-

14 (Tex. App. — Houston [14th Dist.] 1987, no writ) (testimony implying settlement did not establish settlement offer was actually made); *Minchen v. First Nat'l Bank*, 263 S.W.2d 601, 605-06 (Tex. Civ. App. — El Paso 1953, writ ref'd n.r.e.) (mere reference to "settlement" does not necessarily imply an offer of compromise); *Crawford v. Ramey*, 13 S.W.2d 747, 749-50 (Tex. Civ. App. — El Paso 1929, writ dism'd) (testimony that defendant had offered to pay one-half of demanded debt does not constitute offer of compromise). We conclude the trial judge did not abuse his discretion under Rule 408 or Rule 409 of the Texas Rules of Evidence.

Even if we were to conclude the "Advance Payment Receipt" implies an offer of compromise or settlement, it is not automatically excluded. Rule 408 does not require exclusion where the evidence is offered for some other purpose. *Portland Sav. & Loan Ass'n v. Bernstein*, 716 S.W.2d 532, 537 (Tex. App. — Corpus Christi 1985, writ ref'd n.r.e.), *cert. denied*, 475 U.S. 1016 (1986) (evidence of settlement negotiations admissible to prove alleged misrepresentations); *Leija v. American Auto Ins. Co.*, 242 S.W.2d 814, 815 (Tex. Civ. App. — San Antonio 1951, writ dism'd) (written instrument given by injured plaintiff containing certain admissions was admissible even though given in the context of settlement discussions; fact that writing contains offer of compromise does not render it inadmissible since it is competent evidence for other purpose). Conant contends the "Advance Payment Receipt" was introduced to support the calculations of Conant's past lost wages and to support the fact that he had to pay the $51,500.00 back to Missouri Pacific so that amount advanced would be deducted by the jury. For these reasons, we overrule point of error number eight.

Since the trial judge did not commit error in admitting the Advance Payment Receipt, it is not necessary to determine whether the admission was inherently harmful under Rule 81 of the Texas Rules of Appellate Procedure under point of error

number nine. Additionally, even if, out of an abundance of caution, we were to find evidence of the "Advance Payment Receipt" should not have been admitted, based on the entire record we find any possible error to be harmless. Since the admission did not "cause rendition of an improper judgment in the case" under Rule 81(b)(1) of the Texas Rules of Appellate Procedure, point of error number nine is overruled.

Accordingly, the judgment is affirmed.

FRED BIERY,
Justice

DO NOT PUBLISH.

APPENDIX B

[Rendered January 28, 1991]

No. 90-CI-05266

DONALD R. CONANT VS. MISSOURI PACIFIC RAILROAD COMPANY	IN THE DISTRICT COURT 150TH JUDICIAL DISTRICT BEXAR COUNTY, TEXAS

JUDGMENT

On the 14th day of January, 1991, came on to be heard the above styled and numbered cause, and came the Plaintiff and Defendant and both announced ready for trial, whereupon a jury of twelve persons was selected and evidence was presented. During the trial one juror had to have emergency surgery and the Court elected to continue with eleven jurors. After additional evidence was presented, and after both parties had rested and closed, the Court submitted a charge to the jury. Thereafter, said charge signed by ten of the jurors was returned into Court with the following answers:

Question No. 1: Yes.

Question No. 1A: "It played a part."

Question No. 2: (a) "$ 87,103.00"
(b) "$255,000.00"
(c) "$102,000.00"
(d) "$400,000.00"
(e) "$ 40,000.00".

Thereafter, no one having asked that the jury be polled, the Court thanked the jury and discharged them and ordered the charge of the Court and the jury's answers thereon filed in the papers of the case.

Considering the fact that under the FELA law, the Supreme Court of the United States has held that pre-Judgment interest is not allowed, the Court finds that the Plaintiff should have and recover Eight Hundred Eighty-Four Thousand, One Hundred Three ($884,103.00) from Defendant, and all costs of Court, together with interest at Ten Percent (10%) per annum from date of Judgment.

It is, therefore, ORDERED, ADJUDGED AND DECREED that DONALD CONANT do have and recover of MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY the sum of Eight Hundred Eighty-Four Thousand, One Hundred Three Dollars ($884,103.00), together with all costs of Court, together with interest on all sums awarded herein from the date of this Judgment until paid at the rate of Ten Percent (10%) per annum.

SIGNED this 28th day of January, 1991.

/s/ CARLETON B. SPEARS
Honorable Carleton B. Spears
Judge Presiding

APPROVED AS TO
FORM ONLY:

TINSMAN & HOUSER, INC.
One Riverwalk Place,
14th Floor
700 N. St. Mary's Street
San Antonio, Texas 78205
Tel: (512) 225-3121

By: /s/ RICHARD TINSMAN
Richard Tinsman
State Bar No. 20064000
Attorneys for Plaintiff

BANKSTON, WRIGHT &
GREENHILL, P.C.
8620 North New Braunfels,
Suite 300
San Antonio, Texas 78217
Tel: (512) 829-1921

By: /s/ WADE B. SHELTON
Wade B. Shelton
State Bar No. 18211800
Attorneys for Defendant

ENTRY: Recorded in Volume 929A at page 0169 minutes of the 150th Judicial District court.

RENDERED: January 28, A.D., 1991

APPENDIX C

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

November 11, 1992

Ms. Marlene Tschida Bryan
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San Antonio, TX 78217

Ms. Marilyn H. Williams
Wright & Greenhill, P.C.
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Suite 300
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Mr. Wade B. Shelton
Wright & Greenhill, P.C.
8620 N. New Braunfels
Suite 300
San Antonio, TX 78217

Mr. Richard Tinsman
Tinsman & Houser, Inc.
One Riverwalk Place, Suite 1400
700 North St. Mary's Street
San Antonio, TX 78205

Mr. Ray Perez
Tinsman & Houser, Inc.
700 N. St. Mary's Street
One Riverwalk Place, Suite 1400
San Antonio, TX 78205

Mr. Bernard Wm. Fischman
Tinsman & Houser, Inc.
700 N. St. Mary's Street
One Riverwalk Place, 14th Floor
San Antonio, TX 78205

RE: Case No. D-2853

Style: Missouri Pacific Railroad Company
d/b/a Union Pacific Railroad Company v.
Donald R. Conant

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation, "Writ Denied."

Respectfully yours,

John T. Adams, Clerk

By: /s/ Michael C. Murphey
Michael C. Murphey,
Deputy Clerk

APPENDIX D

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 Dolorosa, Suite 3200
Bexar County Criminal Justice Center
San Antonio, Texas 78205
Herb Schaefer, Clerk

July 8, 1992

K. Blake Coffee
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8620 N. New Braunfels
San Antonio, TX 78217

Ray Perez
Tinsman & Houser, Inc.
One Riverwalk Place, 14th Floor
700 N. St. Mary's Street
San Antonio, TX 78205

RE: Case No. 04-91-00254-CV
Trial Court No. 90-CI-05266

Style: Missouri Pacific Railroad Company
d/b/a Union Pacific Railroad Company v.
Conant, Donald R.

Dear Counsel:

After examination of the record in the above styled and numbered cause the Court DENIES Motion for Rehearing of Appellant, Missouri Pacific Railroad Company d/b/a Union Pacific Railroad Company.

ORDERED the day and year first above written.

Very truly yours,

HERB SCHAEFER, CLERK

/S/ DIANA T. GARCIA

Diana T. Garcia,
Deputy Clerk

APPENDIX E

THE SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

December 16, 1992

Ms. Marlene Tschida Bryan
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Mr. Bernard Wm. Fischman
Tinsman & Houser, Inc.
700 N. St. Mary's Street
One Riverwalk Place, 14th Floor
San Antonio, TX 78205

RE: Case No. D-2853

Style: Missouri Pacific Railroad Company
d/b/a Union Pacific Railroad Company v.
Donald R. Conant

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK

By: /s/ TENCHA DAMIAN
Tencha Damian,
Deputy

APPENDIX F

[Filed January 25, 1991]

NO. 90-CI-05266

DONALD R. CONANT VS. MISSOURI PACIFIC RAILROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY	IN THE DISTRICT COURT OF BEXAR COUNTY, TEXAS 150TH JUDICIAL DISTRICT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking a question about the facts, which you decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony; but, in matters of law, you must be governed by the instructions of this Charge. In discharging your responsibility on this jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such Exhibits, if any, that have been introduced for your consideration under the rulings of the Court, that is, what you have seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answer.

5. You will not decide the answers by lot or drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others will agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon the answers made and to the entire verdict. You will not, therefore, enter into any agreement to be bound by a majority or any other vote of less than ten jurors. All jurors who agree with the verdict shall sign the verdict whether it be ten or eleven members of the jury.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the Judge. If it should be found that you have disregarded any of these instructions it will be jury misconduct and it may require another trial by another jury; then all of our time will have been wasted.

The presiding juror or any other juror who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again.

When words are used in a question in a sense which varies from the meaning commonly understood, you will be given in this

Charge a proper legal definition, which you are bound to accept in place of any other definition or meaning.

Answer "Yes" or "No" unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." Whenever any question requires other than a "Yes" or "No" answer, your answer must be based upon a preponderance of the evidence.

The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case.

QUESTION NO. 1

Do you find from a preponderance of the evidence that MISSOURI PACIFIC RAILROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY and/or any of its employees, other than DONALD CONANT, were negligent with respect to the occurrence in question?

> "NEGLIGENCE" means failure to use ordinary care, that is to say, failure to do that which a person of ordinary prudence would have done under the same or similar circumstances, or doing that which a person of ordinary prudence would not have done under the same or similar circumstances."
>
> "OCCURRENCE IN QUESTION" is the incident when DONALD CONANT fell while climbing aboard an engine in Taylor, Texas on January 26, 1989.

Answer "Yes" or "No."

We, the Jury, answer: Yes

If you have answered Question No. 1 "Yes," then answer Question No. 1A.

If you have answered Question No. 1 "No," do not answer any other questions.

QUESTION NO. 1A

Do you find from a preponderance of the evidence that MISSOURI PACIFIC RAILROAD COMPANY D/B/A UNION PACIFIC RAILROAD COMPANY's negligence, if any, and/or the negligence, if any, of its employees, other than DONALD CONANT, played any part, no matter how slight, in bringing about or causing the injuries and damages to DONALD CONANT which are the subject of this suit?

Answer "It played a part," or "It did not play a part."
We, the jury, answer: It played a part.

If you have answered Question No. 1 "Yes," and Question No. 1A "It played a part," then answer Question No. 2. Otherwise do not answer Question No. 2.

QUESTION NO. 2

Find from a preponderance of the evidence what sum of money, if any, if now paid in cash, would fairly and reasonably compensate DONALD CONANT for his injuries and damages, if any, resulting from the occurrence in question.

In considering any element of damage to be experienced in the future, you are instructed that you should not take into account any possible effect of present or future inflation one way or another.

You are further instructed that any amounts which you allow in damages for lost income, either past or future, is not taxable to DONALD CONANT and you should not increase the amount of the award because of federal taxes because an award in this type of case is not subject to payment of any federal income taxes.

With respect to future loss of earnings, you are instructed that if Plaintiff is able to work in the future but suffers no loss of earnings because of his injury, you must not award him damages for future loss of earnings. However, if Plaintiff is able to work in the future, but his earnings will be diminished because of his injury, he is entitled to recover the difference between the lesser salary he might earn and the greater amount which he could have earned if he had not been injured.

You are instructed that an injured party is under a legal obligation to mitigate his damages, that is, to minimize the economic loss resulting from his injury, by taking reasonable steps to assist in effecting a healing of injury and by resuming gainful employment as soon as such can reasonably be done.

You are instructed that the term "pain and suffering, both physical and mental," as used in this Charge, means not only physical pain and mental anguish as those terms are commonly understood but also includes the loss of capacity for the enjoyment of life.

"OCCURRENCE IN QUESTION" is the incident when DONALD CONANT fell while climbing aboard an engine in Taylor, Texas on January 26, 1989.

Please answer separate in dollars and cents, if any, with respect to each of the following elements:

(a) Loss of earnings in the past, from the date of the incident in question to the present time, resulting from the occurrence in question.

ANSWER: $87,103

(b) Loss of earnings that, in reasonable probability, DONALD CONANT will suffer in the future as a result of the occurrence in question.

ANSWER: $255,000

(c) Pain and suffering, both physical and/or mental DONALD CONANT has suffered in the past, from the date of the occurrence in question to the present time, which resulted from the occurrence in question.

ANSWER: $102,000

(d) Pain and suffering, both physical and/or mental, which, in reasonable probability, DONALD CONANT will suffer in the future as a result of the occurrence in question.

ANSWER: $400,000

(e) Medical care which, in reasonable probability, DONALD CONANT will require in the future as a result of injuries which resulted from the occurrence in question.

ANSWER: $40,000

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the questions asked.

It is the duty of the presiding juror:

1. To preside during your deliberations;
2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge;
3. To write out and hand to the bailiff any communication concerning the case which you desire to have delivered to the Judge;
4. To vote on the issues; and
5. To write your answers to the issues in the spaces provided; and
6. To obtain the signatures of all the jurors who agree with the verdict.

After you have retired to consider your verdict, no one has any authority to communicate with you except the bailiff of this court. You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is returned, whether at the courthouse, at your home, or elsewhere, please inform the Judge of this fact.

When you have answered all of the questions which you are required to answer under the instructions of the Judge, and your presiding juror has placed your answers in the spaces provided, and obtained the signatures, you will advise the bailiff at the door of the jury room that you have reached a verdict, and then you will return into court with your verdict.

/s/ CARLETON B. SPEARS

Carleton B. Spears, Judge
150th Judicial District Court
Bexar County, Texas

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into court as our verdict.

To be signed by those rendering the verdict

/s/ _____ /s/ _____

/s/ _____ /s/ _____

/s/ _____ /s/ _____

/s/ _____ /s/ _____

/s/ _____ /s/ _____

JURY IN:
FILING: FILED
January 23, 1991

JURY OUT:
FILING: FILED
January 25, 1991

No. 92-1477

In The

Supreme Court of the United States

October Term, 1992

MISSOURI PACIFIC RAILROAD COMPANY,

Petitioner,

vs.

DONALD R. CONANT,

Respondent.

On Petition for Writ of Certiorari To The Court Of Appeals For The Fourth Court Of Appeals District Of Texas

RESPONDENT'S BRIEF IN OPPOSITION

BERNARD WM. FISCHMAN
Counsel of Record

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700 N. St. Mary's Street
San Antonio, Texas 78205
Tele: (210) 225-3121
Fax: (210) 225-6235

Counsel for Respondent

QUESTION PRESENTED

Respondent respectfully disagrees with Petitioner's statement of the question presented and suggests that the issue is more properly formulated as follows, *viz:*

> Whether the Texas courts' holding that the failure to instruct the jury to discount future lost wages to their "present-value," in a case under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §51 et seq. is "reversible error" where (i) the only evidence was that the *already discounted* future earnings lost as a result of Respondent's injury were $838,000; (ii) the jury applied its own "discount" of almost 70% to arrive at a reduced award of $255,000; and (iii) a federal court applying the equivalent principles of law under 28 U.S.C. §2111 (1982) and Fed. R. Civ. P. 61 would have reached the same conclusion as the Texas courts in application of the "harmless error" rule.

CERTIFICATE OF PARTIES

In order that members of the Court may determine disqualification or recusal pursuant to Sup. Ct. R. 29, Respondent certifies that the following is a complete list of the parties and counsel interested in the outcome of this case:

Name/address of this party:	**Position in the trial court:**	**Counsel for this party:**
Donald R. Conant, Respondent 9214 Valley Haven San Antonio, Texas	Plaintiff	Bernard Fischman *Counsel of Record* Richard Tinsman Tinsman & Houser, Inc., 700 N. St. Mary's Street 1400 One Riverwalk Place San Antonio, Texas 78205
Missouri Pacific Railroad Co., a subsidiary of Union Pacific Railroad Company, Petitioner 801 Travis Street, Suite 1600 Houston, Texas	Defendant	Lori Meghan Gallagher Counsel of Record Kathleen E. Fenwick Andrews & Kurth, LLP 4200 Texas Commerce Tower Houston, Texas 77002

In this brief, Respondent will sometimes refer to the parties by their respective positions in the trial court or by the terms "Conant" and "Railroad."

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JURISDICTION

Respondent agrees that the Supreme Court of the United States has jurisdiction of this case under 28 U.S.C. §1257(a) (Supp. 1992).

STATEMENT OF THE CASE

A. Procedural History of the Case

This is a case under the Federal Employer's Liability Act ("FELA") 45 U.S.C. §51, et seq. in a court of the State of Texas. Plaintiff, Donald R. Conant, a 17-year employee of the Railroad, suffered a debilitating back injury while attempting to climb the ladder onto his locomotive in the early morning hours of January 26, 1989. The jury found the Railroad was negligent in permitting Conant to return to work as an engineer despite the information known to the Railroad's own medical director that Conant's prior knee injury made it clearly unsafe for him to be climbing ladders on locomotives (Tr. 26).[1]

Judgment awarding total compensation for Conant's damages in the amount of $884,103.00 was signed January 28, 1991 (Tr. 34). The Railroad's motion for new trial (Tr. 35) was overruled by order signed March 12, 1991 (Tr.

[1] In this brief, Respondent will refer to the court record using the customary references found in Texas' appellate court procedure. Thus, the designation of "Transcript" (abbreviated "Tr.") refers to the trial court pleadings, verdict and judgment. The designation "Statement of Facts" (abbreviated "SF") refers to the official record of testimony from the trial court. The term "Px" refers to Plaintiff's exhibits at trial.

38). The Railroad timely perfected appeal and superseded the judgment (Tr. 41). By opinion and judgment filed April 30, 1992, the Court of Appeals for the Fourth District of Texas affirmed the trial court's judgment. The opinion of the Court of Appeals correctly states the nature and result of the case. The Railroad's motion for rehearing in the Court of Appeals was overruled on July 8, 1992.

On November 11, 1992, the Texas Supreme Court denied the Railroad's petition for discretionary review by writ of error to the Court of Appeals. Petitioner's motion for rehearing in the Texas Supreme Court was denied on December 16, 1992.[2]

B. Evidence that Respondent's Lost Earnings were Discounted to Present Value

In support of his claim for lost wages, both past and future, Plaintiff offered the testimony of Dr. Everett Dillman, Ph.D., an economist and former university professor in business administration. Without contradiction, Dr. Dillman calculated the earnings and the value of fringe benefits that Conant would have enjoyed had his railroad career continued. Using Conant's last full year of

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[2] On October 1, 1990, Conant filed bankruptcy in the United States District Court for the Western District of Texas, San Antonio Division. On January 20, 1993, the Court of Appeals denied the Railroad's request for a stay of enforcement of the judgment pending the present petition for certiorari. The judgment was paid in full, on February 2, 1993. The parties have stipulated that payment of the judgment would not be considered a ground for denial of the writ of certiorari.

employment (1988) as a base, Dr. Dillman concluded that Conant's annual earnings and benefits would have been worth approximately $72,500.00 (SF 512). Factoring in deductions for income taxes and projected offsetting wages Conant could earn at his substitute job delivering pizza, the expert pegged the present value of lifetime lost earnings at approximately $1,091,000.00 (SF 523). From this projected amount he made allowances for the possibility that Conant could, at some point, return to school, complete his education and within a few years begin earning about one-half of what he had been making as a railroad engineer (SF 524-26). Professor Dillman also made allowances for the effects of inflation versus a present value for the future stream of income, concluding that the pluses and minuses would offset one another (SF 520-21; 547-49). From a "best case" scenario in which Conant does, in fact, obtain a college degree and regain a portion of his earning power over a period of years, *he still has a projected lifetime income loss of approximately $838,000.00 measured at present value* (SF 527; Px 17). Of that total, the jury awarded only $87,000.00 for past lost wages and $255,000.00 in future lost earnings (Tr. 29).

C. Preservation of the Federal Question

The Railroad's statements concerning the manner in which the federal question was presented to the trial court are somewhat misleading (Petition, pp. 3-4). While the Railroad did tender a present value instruction (Request No. VIII, Tr. 17), its proposed instruction was affirmatively incorrect in instructing the jury to discount not only the future earnings, but also future physical pain and mental anguish as well. This Court's holding in *St.*

Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985), requires discounting of "pecuniary benefits" only, citing *Chesapeake & Ohio Ry. Co. v. Kelly*, 241 U.S. 485, 491 (1916). The instruction proffered by the Railroad went beyond that required by *Dickerson* and *Kelly*. *Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 886 (8th Cir. 1980) *cert. denied*, 450 U.S. 921 (1981).

Under Texas' procedural rules, not only must a tendered instruction be substantially correct, it must not be affirmatively *in*correct. *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987); Tex. R. Civ. P. 278.[3] Thus, when Conant's counsel objected to the Railroad's proposed instruction, his observation that there is no case law requiring reduction of physical pain and mental anguish to their present value (SF 1038) was correct. *Texas & Pac. Ry. v. Buckles*, 232 F.2d 257, 264 (5th Cir. 1956).

The further observation that Plaintiff's counsel "persuaded the court that it did not need any instruction on present value" is likewise somewhat misleading. Counsel's comment (SF 1047) came in the context of the discussion regarding inflation as a factor to consider in assessing damages. The court had observed correctly " . . . inflation is a factor of the present value." (SF 1046) Conant's counsel agreed and suggested that, given the state of the evidence the instruction was unneeded. In the

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[3] In relevant part, that rule provides: "Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment."

final jury charge, both the inflation and nontaxability instructions were given (Tr. 28).

REASONS FOR DENYING THE PETITION

The trial court's failure to instruct the jury on present value was harmless error because:

A. Plaintiff's expert did, in fact, discount the future earnings to their present value and the jury awarded much less than the discounted amount.

The Railroad correctly says that the court's instructions preceding the jury question regarding Plaintiff's damages failed to advise the jury to discount to its "present value" the amount of Conant's future earnings lost by reason of his injury. *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985). Plaintiff's expert, Dr. Everett Dillman, did, however, make just such an adjustment in determining the value of the future stream of lost wages (SF 516-18). The issue is whether the Railroad has shown that the trial court's failure to instruct on present value was an error which, in reasonable probability, caused the rendition of an improper verdict. Plaintiff believes that the Court of Appeals held correctly that the Railroad did not meet that burden.

In *Southern Pac. Trans. Co. v. Hernandez*, 804 S.W.2d 557, 561 (Tex. App. – San Antonio 1990, writ denied), *cert. denied*, 112 S.Ct. 406 (1991) the trial court refused to include in the jury charge an instruction informing the jury that FELA awards are not taxable. In order that the

damages awarded in FELA cases should more closely reflect their fair value, *Dickerson* requires a present value instruction. To the same end, the case of *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490 (1980), *reh'g. denied*, 445 U.S. 972 (1980), holds that the refusal to submit a non-taxability instruction is error. Yet, the *Hernandez* court held, notwithstanding the *Liepelt* decision, that the trial court's failure so to instruct was harmless error under Tex. R. App. P. 81(b). *Hernandez, supra*, 804 S.W.2d at 561.

The Railroad both criticizes the Texas court's reliance on its own precedent and attempts to distinguish the result in *Hernandez*, arguing that under *Liepelt*, the non-taxability instruction is *not always* required but that under *Dickerson*, a present value instruction *always is* required. The purported distinction is illusory. In terms of the effect on a jury's decision-making process and the amount of any FELA award, the impact of taxation on the calculation of damages is likely to be a much greater factor in reducing the award than the more difficult to apply concept of discounting to present value. Certainly, the two concepts are at least qualitatively the same, if not equal in their impact.

Failing to distinguish *Hernandez*, the Railroad alternatively argues that *Hernandez* is incorrect and places the Texas courts at odds with the federal courts which have addressed the issue. The Railroad relies on *Beanland v. Chicago, Rock Island & Pac. R.R.*, 480 F.2d 109, 111, 114-15 (8th Cir. 1973) and *Colburn v. Bunge Towing, Inc.*, 883 F.2d 372, 377 (5th Cir. 1989), which say that failure to give the present value instruction is error, regardless of the reason for its omission from the charge.

Although the *Colburn* court found that the omission of the present value instruction was plain error, even in the absence of the towing company's objection, the matter does not end there. There was compound error in the case. The *Colburn* court was also concerned with a "unit of time" argument made by plaintiff's counsel during his summation. Following the initial jury instructions, the trial judge invited counsel to object to the charge. The towing company did object to the "unit of time" argument and tendered a proposed cautionary instruction which the trial judge refused. 883 F.2d at 376. Noting that even in the absence of objection "we *may* still reverse for plain error," 883 F.2d at 377 (emphasis added), the *Colburn* court proceeded "to consider the instructions as a whole, the evidence presented and the arguments of counsel." *Id.* The court stated:

> Reversible error exists when this court has a 'substantial and ineradicable doubt as to whether or not the jury has been properly guided in its deliberations.' *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir. 1985). Here, we have such doubt. Allowing a 'unit of time' argument without a specific cautionary instruction *and* failure to instruct the jury on present value *could have had* a considerable effect on the amount of the jury verdict. We therefore vacate the $450,000 damage award.

883 F.2d at 377-78 (emphasis added).[4]

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[4] Indeed, the Fifth Circuit has held that while it may reverse for plain error in an instruction to which no objection was made, *Chagas v. Berry*, 369 F.2d 637, 641 (5th Cir. 1966), *cert. denied*, 389 U.S. 872 (1967), that power will be exercised only in

Beanland was encumbered with similar compound errors. There, the injured plaintiff's verdict was contaminated with evidence of his distress at witnessing the death of his co-worker who was killed in the same accident. Further, there was evidence pertaining to the plaintiff's wrongful discharge, an intentional act, the evidence of which "[had] no place in a personal injury FELA action which deals exclusively with *negligence.*" 480 F.2d at 113. Additionally, the railroad was erroneously precluded from introducing expert testimony to answer the plaintiff's claims regarding certain railroad operating rules. *Id.* at 116. The compound effect of these errors was sufficient to warrant a new trial. It is interesting to note that a concurring judge agreed with the court's holding on the present value instruction, but suggested that ". . . fairness to the plaintiff requires consideration of likely increases in future earnings attributable to offsetting inflationary trends in the economy." *Id.* at 116-117 (Bright, Circuit Judge, concurring).

The significance is this: Even where there is "plain error," the reviewing court is not required to reverse *unless* there is raised such a degree of doubt, that the verdict unmistakably must have resulted from the misguidance of the instructions. Thus, even under *Colburn*, there is no automatic mandate for reversal. It is the totality of the evidence, argument and instructions which tell the story. In this case, the Texas Court of Appeals' decision took all those factors into account and concluded that, on the totality of the record, the error was harmless.

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exceptional cases. *Delancey v. Motichek Towing Serv., Inc.*, 427 F.2d 897, 901 (5th Cir. 1970).

Colburn does not support the Railroad's contention that the Fifth Circuit would have found differently under its own standard. *Colburn* does not support the Railroad's conclusion that this case and the earlier decision in *Hernandez* place the Texas courts at odds with the Fifth Circuit and this Court's own precedents.

Thus, the real focus should be not on an artificial distinction between *Liepelt* and *Dickerson*, but rather, on whether the facts of this case establish that omitting the instruction caused the rendition of an unjust verdict.[5] A review of Dr. Dillman's present value testimony shows that the Court of Appeals was correct in its conclusion. In explaining his computations, Dr. Dillman testified:

> The fourth thing that I have to do is that I have to also allow for the fact that we are talking about monies that won't all be received in the first year. Some would be received in the second year and the third year and the third year all the way up to the twenty-third year. . . . But I have to represent that flow of twenty-three years as one hunk of money. . . . **We call it present day value.**

(SF 516-17; emphasis added). However, Dr. Dillman also pointed out the historic trend of inflation in all segments of the economy, including wages is such that " . . . essentially, they do offset completely" (SF 518; Px 17). That he had made the allowance is clearly brought out in Railroad counsel's cross examination:

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[5] *See also, Flanigan v. Burlington Northern, Inc.*, 632 F.2d 880, 889 (8th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981) (Failure to instruct on non-taxability of FELA award was harmless error).

> Q [by Railroad's attorney]: And at the end of it, even though you would have been withdrawing $50,000.00 every year, you would still have a million dollars when it is all said and done?
>
> A [by Professor Dillman]: Sure.
>
> Q: That is why we have to discount to present value when we are talking about future earnings?
>
> A: I already have.
>
> Q: . . . Your assumptions that you based your calculations on say that because wages in your opinion will grow over the course of 22 years, just as fast as interest rates, or will shrink just as fast as interest rates, either way, then the discount – the discount value is zero?
>
> A: Effective net discount would be zero, yes.
>
> Q: In other words, you are predicting wage rates to grow or stay even with interest rates?
>
> A: After taxes, yes.

(SF 548). Dr. Dillman placed a minimum discounted present value of $838,000 on Plaintiff's lost wages (Px 17). He testified:

> Q: [by Plaintiff's counsel]: Now, is the way you figure the $838,497 the way, in your opinion, the most reasonable, if he goes to school and gets the engineering degree in four years?
>
> A: [by Dr. Dillman]: Yes.

(SF 527).

The principal thrust of the Railroad's petition is that Texas' "harmless error" rule is legally impermissible and conflicts with a federally-mandated "reversible error" standard applied in FELA cases. Having set up this false premise, the Railroad made, in its briefs in the Texas courts, the profound declaration *"That is the end of the inquiry."* Unfortunately for the Railroad, the case law, statutes and rules show it is *not* the end of the matter. The Railroad ignores the federal courts' own rules of harmless error as declared in Fed. R. Civ. P. 61 and 28 U.S.C. §2111 (1982). The federal statute provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

It is clear that the judgment in this case did not work any injustice, much less a substantial one, to the rights of the parties. Were this case tried under the dictates of Fed. R. Civ. P. 61 and the federal harmless error statute, it is clear that the judgment would not be disturbed, even though the present value instruction was not given.

In applying the harmless error rules, the federal courts have consistently ignored errors in instructions if it is apparent that the error would not have changed the result. *See, e.g., Lusby v. T.G. & Y. Stores, Inc.*, 796 F.2d 1307, 1310 (10th Cir. 1986), *cert. denied sub nom. City of Lawton Oklahoma v. Lusby*, 479 U.S. 884; *Circle J. Dairy, Inc. v. A.O. Smith Harvestore Products, Inc.*, 790 F.2d 694, 699 (8th Cir. 1986); *Spano v. Kominklijke Rotterdamsche Lloyd*, 472 F.2d 33, 35 (2d Cir. 1973); *Smith & Co. v. Russek*, 212 F.2d 338 (5th Cir. 1954).

While there is no precise definition of "harmless error" under the federal cases, in making such a determination the court necessarily must look to the circumstances of the case and whether there is substantial evidence to support the verdict. *Kotteakos v. United States,* 328 U.S. 750 (1946). As this Court observed, "to weigh the error's effect against the entire setting of the record without relation to the verdict or judgment would be almost to work in a vacuum." 328 U.S. at 765. In this case, looking at the pleadings, uncontradicted evidence and the verdict, the error in omitting a present value instruction was harmless and did not affect the substantial rights of the Railroad.

The Railroad cites a number of cases from federal and state court jurisdictions in which the present value instruction was upheld. However, these cases are distinguishable for two critical facts: (1) here, the Railroad offered *no evidence* to contradict the Plaintiff's calculation of future lost wages and (2) here, the Railroad offered *no evidence* of any discount rate to be applied by the jury in its analysis. Nevertheless, the end product was an overall 70% *reduction* in the award for future lost income. Application of a 3% present value discount, without allowance for inflation against Professor Dillman's already discounted projected net lifetime loss of $838,000, yields an additional reduction of only $206,714, for a net reduced verdict of $631,286. Obviously, the jury's net overall reduction of 70% greatly exceeded any effective discount the Railroad could have expected based simply on a present value analysis.

In those cases which must nearly coincide with the state of the evidence in this case, the courts trying FELA

cases have reached a similar result. For example, in *Miller v. Union Pacific R.R. Co.*, 900 F.2d 223, 226 (10th Cir. 1990) the court held:

> The law in the federal courts, however, is that when, as in this case, 'neither party provides competent evidence of the inflation rate or the discount rate, the district court [or the jury] must make a lump sum award that is not adjusted for either factor.' *Alma v. Manufacturers Hanover Trust Co.*, 684 F.2d 622, 626 9th Cir. 1982). The district court did not err in refusing the tendered [present value] instruction.

900 F.2d at 226. In a footnote to the quoted material, the court held that the refusal to give the present value instruction is not affected by the requirements of *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1988). The court observed that *Monessen* deals with the substantive right to the present value instruction but *not* with the *distinct question* of whether an evidentiary foundation must be laid to support such an instruction in a particular case.

In the *Alma* case, cited by the *Miller* court, the Ninth Circuit held that "where the plaintiff adequately proves the inflation factor but the defendant fails to establish the discount rate, the lump sum must be adjusted only for inflation." 684 F.2d at 626. *Accord, Brady v. Burlington Northern R.R. Co.*, 752 P.2d 592 (Colo. App. 1988) (trial court should not have instructed jury to adjust to present value award for future losses without competent evidence of how adjustment procedure worked and what was a fair adjustment).

The case of *Bonura v. Sea Land Serv., Inc.*, 505 F.2d 665, 668-69 (5th Cir. 1974) does not support the Railroad's position in this case. In *Bonura*, the defendant carrier did not complain of the substance of the trial court's instruction. Rather, the issue focused on whether the plaintiff had introduced adequate evidence to support the jury's calculation of the future damage award. Similarly, *Blue v. Western Ry. of Alabama*, 469 F.2d 487 (5th Cir. 1972) adds nothing to the analysis. In *Blue*, a present value instruction was given which erroneously mandated a discount rate greatly in excess of the appropriate rate, taking into account the fluctuation of interest rates over the long term. 469 F.2d at 497. *See also, Heater v. Chesapeake & Ohio Ry. Co.*, 497 F.2d 1243, 1249-50 (7th Cir. 1974), *cert. denied*, 419 U.S. 1013 (1974). In *Heater*, a present value instruction was given and the issue was whether it was error to omit additional instructions explaining an appropriate method of computation. In this case, the court's instruction (Tr. 28) to find that "sum of money, if any, *if now paid in cash*, [which] would fairly and reasonably compensate Donald Conant for his injuries and damages . . . " could be considered the practical equivalent of such a minimal present value instruction.

B. The Railroad offered no evidence as to what discount rate should be applied.

The Railroad offered no contradictory testimony, expert or otherwise regarding Conant's lost wages. The railroad did not offer proof of a suggested discount rate. Under Texas law, the Railroad's failure to offer any evidence of what the discount rate ought to have been is not,

in itself, preclusive of the jury's ability to apply a discount factor. *Missouri Pacific R.R. Co. v. Kimbrell,* 334 S.W.2d 283, 286 (Tex. 1960). Yet, on the facts of this case, the result is still the same because the actual amount found by the jury – $255,000 (Tr. 29) – is a figure deeply discounted from the *only* evidence offered for their consideration. In the absence of contrary evidence, it is difficult to envision the jury's making an informed present value calculation.

C. The evidence was uncontradicted that the effect of discounting to present value was offset by the effects of future cost of living increases.

The "total offset" approach used by Professor Dillman is neither illogical nor unprecedented. *See, e.g., Lucas v. United States,* 807 F.2d 414, 422 (5th Cir. 1986) (medical malpractice action under Federal Tort Claims Act); *Meader v. United States,* 881 F.2d 1056, 1058-60 (11th Cir. 1989) (also a medical malpractice suit under the FTCA). As in *Lucas,* the failure to introduce evidence controverting the opinion that inflation offsets the discount rate precludes the complaint on appeal. 807 F.2d at 422; *see also, Jones & Laughlin Steel Corp. v. Pfeiffer,* 462 U.S. 523, 550 (1983) (parties may stipulate to offset market rate of interest against inflation); *Howard v. Chesapeake & Ohio Ry. Co.,* 812 F.2d 282, 287 (6th Cir. 1987) (" . . . Although the 'total wash-out' or 'total offset' concept has not been accepted as a mandatory federal rule of decision, it is prominently featured on the menu of economic theories from which courts may currently choose in FELA cases.")

The Railroad also points to *Monessen S.W. Ry. Co. v. Morgan*, 486 U.S. 330 (1988) as support for its contention that the court's failure to instruct the jury on present value was harmful error. *Monessen* is distinguishable from this case because the trial judge there relied on Pennsylvania's mandatory rule of decision in *Kaczkowski v. Bolubasz*, 491 Pa. 561, 583, 421 A.2d 1027, 1038-1039 (1980). *Kaczkowski* instructed the courts of that state to cease discounting future lost earnings to present value because future inflation would be *presumed* equal to future interest rates. The factors would be deemed to offset one another as a matter of law. This court held that such an *affirmative* instruction to the jury to *disregard* present value was error. *Monessen* does not address the situation where, as here, the court's instructions are silent on present value, but the result is the jury award was less than one-third of the amount shown by the uncontradicted evidence to be the Plaintiff's future lost earnings (SF 516-518, 527; Px 17). Nevertheless, the Railroad implicitly speculates that the error was harmful because the jury would likely have awarded a lesser amount had it been instructed to apply a discount factor. There is no evidentiary support in this record for any such speculation.

The bottom line of this case is that the jury award effectively represents a discount rate *far greater* than prevailing rates or the nominal 1% – 3% "below market" rates suggested by the case of *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 527 (1983).[6] The uncontradicted testimony was that the impact on Conant's future earnings

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[6] *Jones & Laughlin* was an action under the Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. § 904. The Supreme Court held that the district court erred in applying

was at least a net loss of $838,497 (SF 526). The jury awarded $255,000 (Tr. 29). In truth, the jury bought the Railroad's argument that Conant should have gone back to college (SF 1106-1109) and awarded him four years' loss of income plus the estimated costs of the college education.[7] The total award of $255,000 reflects pretty closely an award of four years' lost wages plus college

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Pennsylvania's "total offset" rule of the *Kaczkowski* case as a **mandatory** federal rule of decision. 462 U.S. at 551. However, the *Jones & Laughlin* opinion does not automatically condemn a total offset as a **result** if it is reached through "sound economic argument." After a lengthy discussion of the factors influencing the discount/inflation analysis, the Supreme Court said "having surveyed the multitude of options available, we will do no more than is necessary to resolve the case before us." 462 U.S. at 547. Noting that specific forecasts of future price inflation may be unreliable but that the discount rate is equally an arbitrary factor, the court held "the average accident trial should not be converted into a graduate seminar on economic forecasting" citing, *Doca v. Marina Mercante Nicaraguense, S.A.*, 634 F.2d 30, 39 (2d Cir. 1980). While noting that courts adopting a below market discount rate or "real interest rate" of between 1% and 3% would not be reversed, the Supreme Court did not go so far as to mandate a specific rate or range of rates. In the final analysis, a fair reading of *Jones & Laughlin*, and subsequent cases shows that (i) the parties should try to agree in advance on a stipulated rate but (ii) if they cannot, any rate proved by the evidence may be acceptable if supported by rational economic argument and (iii) a **resulting** total offset is not unacceptable or irrational as long as (iv) it is not the mandatory rule of decision.

[7] According to the Railroad's expert, Terry Van der Molen, the estimated costs for Conant's college education would range from a low of $33,000 to a high of $68,000 and the probable amount would be $48,000 (SF 1026-27). Conant's lost wages during the four years of college would be a little over $50,000 per year (SF 742) exclusive of fringe benefits.

costs. Had the jury simply used the *Jones & Laughlin* approach and applied a 1% – 3% discount to the entire $838,000 estimated by Professor Dillman, the lost earnings award would have been in excess of $500,000. The error, if any, in failing to instruct the jury to discount future earnings to present value was harmless on the facts of this case.

Conclusion and Prayer

For the reasons stated, Respondent Donald R. Conant prays that the United States Supreme Court deny Petitioner's petition for writ of certiorari.

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